No. 11629

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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To the Honorable Samuel M. Driver, Clifton Mathews and Albert Lee Stephens, Judges of the United States Court of Appeals for the Ninth Circuit:

Come now the appellants and respectfully petition for rehearing upon the following grounds, to wit:

(1) The court erred in matters of fact in its opinion;

(2) The court erred in matters of law in its opinion.

I.

The Court Erred in Matters of Fact in Its Opinion.

In its opinion, this Honorable Court stated that the defendants were charged in Count Four with wilfully causing Byron N. Taylor to make false and fraudulent statements in a matter within the War Assets Administration, to wit, "In a Veteran's Application for Surplus

Property and a Purchase Requisition form filled out by Taylor."

The opinion nowhere refers to the fact that the exhibits show that the applications were not made out on a form of the War Assets Administration, but on a form of the Smaller War Plants Corporation [R. 376], and there is no testimony that this form was a form that was a form of the War Assets Administration or that was within the jurisdiction of the War Assets Administration.

The form reads as follows [R. 376]:

(Photostat)

376

CONFIDENTIAL - For Use of Federal Agencies Only.

Form Approved
Budget Bureau No. 15-R2568

Form SMPC-66 (9-29-45) — United States of America — SMALLER WAR PLANTS CORPORATION

DO NOT FILL IN THIS SPACE

Case No. V 33 A 34004

Date JUL 11 1946

VETERAN'S APPLICATION FOR SURPLUS PROPERTY

(Under SPR Reg. 7)

IMPORTANT - See Instructions on Separate Sheet

1. Applicant
BYRON N TAYLOR
(First name) (Initial) (Last name)

2. Mailing address
2017 - 2nd [redacted] ST
(Street, RFD, or P.O. Box)
Telephone No. S.M. 65891
SANTA MONICA LA. CALIF
(City and Zone) (County) (State)

3. If other application has been filed on this form, SMPC-66, indicate place and date of filing
None

4. Trade name of enterprise
None

5. Address of enterprise
None
(Street, RFD, or P. O. Box No.) (City and Zone) (County) (State)

6. (a) Type of enterprise (Check one)
Business [X] Professional [ ] Agricultural [ ]

(b) Legal form of enterprise (Check one)
Corporation [ ] Partnership [ ] Individual Proprietorship [X]

(c) Description of enterprise
TRANSPORTING OIL

7. Is the enterprise already established NO (yes or no) If "Yes", are you now operating it? (yes or no)
How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise? SOON AS POSSIBLE

8. Size of enterprise.
Briefly estimated number of man servers ..

	Present	Anticipated in 3 months

9. What experience, training, or education have you had which you believe assures the success of this enterprise? TOOK BUSINESS TRAINING IN HIGH SCHOOL AND SUFFICIENT EXPERIENCE IN SERVICE

10. Description of items wanted.

Quantity (a)	Unit (b)	Description (List items in order of preference) (c)	Is inspection desired? (Yes or No for each item) (d)	Search expiration date (e)
6		1 Truck tank trailer		
		CERTIFIED FOR VETERAN'S PREFERENCE H. L. KRUEGER, Chief, Veterans Branch By		

(Use extra sheets, if necessary, and attach to this application)

11. Will you desire the extension of credit by SMPC in the purchase of any of the items listed above? (yes or no)

If "Yes", please furnish the additional information requested in Items 12 through 17 following.

V-1946 to-up

The Smaller War Plants Corporation was dissolved by an Act of Congress, December 27, 1945.

10 F. R. 15365.

No explanation is made as to the jurisdiction or power of the War Assets Administration, nor is there any showing that the alleged statements contained in the application were on an application of the War Assets Administration.

The document must, of necessity, speak for itself as a document of the Smaller War Plants Corporation and a form for Veterans' Application for Surplus Property of the Smaller War Plants Corporation, not an application of the War Assets Administration. We fail to see, therefore, how such a document or statement appearing in such a document is "a matter within the jurisdiction of the War Assets Administration." Very evidently, the court, in its decision, overlooked this important document, which is the basis of the entire prosecution for there is nowhere any mention of it in the entire opinion of the court.

See *Defense Supplies Corporation v. Lawrence Warehouse, et al.,* for the effect of dissolution of the Defense Supplies Corporation, 164 F. 2d 773.

The Court, further in its opinion, erred in the factual statement that "Taylor had no intention of going into the oil transport business." Whether Taylor did or did not intend to go into the oil transporting business rested on his own contradictory statements in the application which he made and the statement which he made in the court room contradicting what he said under penalty of making a false statement to the government in his writing on the Smaller War Plants Corporation form. The court incor-

rectly assumed that he was telling the truth in the court and not when he made his statement when he was making it on the form in question.

There is no more reason to give full credit to his statement in court than there was to give full credit to his other statement, which certified as follows, in question 18:

> "I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief," etc.

and further,

> "that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 per cent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed $25,000 if an agricultural enterprise, or $50,000 if a business enterprise," etc. [R. 377.]

The evidence indisputably shows that Taylor, if not directly, was indirectly to be interested in the enterprise and that no person or persons other than veterans have, or will have, any proprietary interest in the enterprise.

The purpose of the statute and regulation, so far as the War Assets Administration was concerned, was not to deny veterans—both appellants being veterans with honorable discharges and excellent records—of the right to help other veterans in this, to the extent of paying him but of giving him an opportunity to make money in a "small business enterprise." The appellants herein could

very well have, on July 11, 1946, bought all the government automobiles they wanted from "licensed automobile dealers who were not veterans but who could come to the war assets administration and buy on a first come, first serve basis without priority at all." How, then, was any statement made by a veteran to get automobiles for resale to other veterans, or to be associated with other veterans who were financing them, we respectfully submit, stretching the statute and the applicable regulation beyond their clear intent. It was for this reason that we contended from the start that the indictment did not state a public offense and, furthermore, that we contended that the evidence was entirely insufficient to justify the verdict.

On July 11, 1946, it was uncontradicted in the record that the sales were open to veterans and non-veterans on a first come, first serve basis. There was no restrictions except as to numbers of items and there was no restriction against a veteran buying his quota and turning it over to some other veteran who may have received his quota, or being in partnership with the veteran who may have already received his quota.

There is nothing in any of the testimony that shows that there was any restriction that forbade Todorow or Potolski from buying any trucks that Taylor might have acquired. Mr. Alexander testified that each purchaser could buy 25 units at the time [R. 121] but there was nothing to stop them from reselling these tank refueling trucks for a profit. The testimony was as follows:

> "Q. By Mr. Lavine: Mr. Alexander, commencing July 2nd, the sales of surplus were then open to everybody, were they not? A. No; it was not.

Q. Was it open to non-veterans as well as veterans? A. Yes; it was.

Q. And the dealers could come in and buy, could they not, on July 2nd? A. Yes; they could.

Q. And there was no prohibition against the dealers reselling to anyone else, was there? A. No; there was not.

Q. So that, under your regulations, if a dealer bought 25 two and one-half-ton trucks there was nothing to stop that dealer from reselling to Mr. Todorow or Mr. Potolski as of June 2, 1946, isn't that correct?

The Court: You mean commencing July 2nd?

Mr. Lavine: Yes; commencing July 2nd, 1946.

The Court: On transactions had commencing July 2nd, 1946?

Mr. Lavine: Yes.

The Court: Your answer? A. That is correct.

Q. By Mr. Lavine: And could buy on July 11, 1946 from dealers—dealers who were non-veterans could buy up to 25 units of tank refueler trucks, could they not, after July 2, 1946? A. That is correct.

Q. And they could resell those tank refueler trucks to anyone for a profit, could they not? A. That is correct.

Q. In other words, they could resell six or resell up to 25 that they had bought to Mr. Potolski and Mr. Todorow, isn't that correct? A. That is correct.

Q. On July 11, 1946? A. That is correct." [R. 124.]

"Q. By Mr. Lavine: But they could rebuy from some other dealer, isn't that correct; after July 2, 1946 anybody could buy from a dealer? A. That is correct.

Q. And although he was limited to getting 25 from the War Assets Administration, he could buy a hundred if he found three or four dealers who had the hundred, isn't that correct? A. That is correct.

Q. Mr. Alexander, there were a number of veterans who came up to Port Hueneme, isn't that correct? A. Many thousand.

Q. Many thousands. And they were buying all kinds of supplies that you had at Port Hueneme, isn't that correct? A. That is correct." [R. 125.]

It is thus evident that as of July 11, 1946, when the sales were open to veterans and non-veterans, that there could be no possible offense in veterans selling to veterans if even non-veterans could sell to veterans.

The court, therefore, incorrectly assumes the truth of at least one of two elements. It is, of course, undisputed that Taylor made the representations but that these representations were false is certainly not established by the evidence in this case.

The opinion states that "It may fairly be assumed that they (the defendants) were familiar with the procedure followed at the sale, the application forms used and the requirements as to veterans, as they had previously purchased their full quotas as veterans." This assumption is not established by any substantial evidence as the form allegedly used by Taylor was a confidential form not released by the Governmental agency and, as a matter of fact, not shown to be a form of the War Assets Administration.

There is nothing in the record to show that a purchaser of six refueling trucks on July 11th, 1946 would be required to follow a procedure or use a form which was being used at some prior date or in some prior proceedings.

In view of the language of the application, as well as the language of the statutes, it cannot be assumed without testimony that "they knew that he was not a dealer and it is only claimed as priority as a veteran," nor is there any substantial proof that they induced him to make the application for the purchase of the trucks for their benefit and not for his own use, or that he was obliged to make the alleged representations.

The court states that there is no sound reason for invoking the perjury rule with respect to the testimony of Taylor for the reason that "we are not called upon to sustain the finding that statements were false beyond the rule or against an oath." However, the testimony in this case showed that Taylor was a neurotic war veteran [R. 200, 201]. "It was a release for a nervous condition." [R. 200.] He got a medical discharge. His fellow partner Lauridsen was in a mental hospital at the Sawtelle Veterans Hospital [R. 201]. Taylor had only been in the service nine months when he got his discharge on account of his nervous condition [R. 200]. He told the court he was a liar. He told the court he had lied in his application to the War Assets Administration. He told the court in the present case that he lied before and that now he was telling the truth. But, what substantially was there to establish that he was telling any more the truth now than he was when he falsified before the War Assets Administration? In any event he was an admitted perjurer. He sought, however, to blame somebody else for his falsification.

Under those circumstances, the rule in perjury should apply because it was his oath against the oath of each of the appellants that his statements were false and that they had caused him to make the statements that were in question. Can the statements of such a witness be considered substantial?

As said in *Sykes v. United States,* 204 Fed. 909, at page 912:

> "And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

The case is very similar to *Dahly v. United States,* 54 F. 2d 37, 44. There, as here, the mental condition of the witness "was shown by the evidence to be open to serious question." Taylor's testimony was denied by the appellants and the only other witness to the conversation was an insane person. Thus it is said in Dahly v. United States:

> "Without trenching upon the general rule that appellate courts will not usually weigh the evidence, yet on account of the foregoing considerations, and in view of the exceptional facts in the case, we are of the opinion that the testimony of Smith relative to the particular matters mentioned cannot be held to be substantial in any true sense of that word. 17 C. J.

§§ 3594-3596; Sykes v. United States, 204 F. 909 (C. C. A. 8); United States v. Murphy (D. C.), 253 F. 404; Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Green v. State, 6 Okl. Cr. 585, 120 P. 667; Stanford v. State, 16 Okl. Cr. 107, 180 P. 712; see, also, Mickle v. United States, 157 F. 229 (C. C. A. 8); State v. Moe, 68 Mont. 552, 219 P. 830; State v. Wilson, 76 Mont. 384, 247 P. 158; Cooper v. State, 130 Miss. 288, 94 So. 161."

Therefore, there is every reason for the "two witness rule" to apply in this case and, in any event, where the testimony is unsubstantial it should not form the basis of sustaining a conviction which will wreck two other veterans in their future whole lives sentencing them to the penitentiary for a period of two years, fining them $3000.00 each, and taking away all their military credits—on such unsubstantial testimony.

Counsel for appellant, also, did not make clear his point that the instruction did not fully state the law and that one refused instruction should have been given in the light of the situation that is shown by the character of Taylor's evidence. Defendant's Instruction 19 specifically presented to the jury the question as to whether the acts done were done by Taylor on his own volition or were done as the result of having been caused to be done by the appellants. It was a very important question of fact which the court omitted to give to the jury and thus left the jury without one of its essential questions, namely, whether Taylor was falsely testifying as to "whether he did the thing on his own volition or did it on the suggestion or causation of appellants."

Another error in the instructions was whether there was any applicable regulation, rule, or order which applied

to the authority of the War Assets Administration. A crime could only be committed if there were applicable rules and regulations issued by the War Assets Administrator pursuant to statutory authority, which made or required a person seeking war surplus to make statements as alleged in the indictment; and, it was therefore just as impelling that the court and jury know both the rules and regulations governing the sales as it was to know exactly what the charge was against the appellants. Without this vital information in either the evidence or the bill of particulars, or otherwise, the jury was without a rudder to guide it as was, in fact, the court also.

The court also misconceives our objection to the instruction given by the court "that it was not necessary for the government to prove that Taylor statements were false in all particulars alleged in the indictment or that appellants caused every statement to be made," it being sufficient if there was the required degree of proof that the statements were false in any one or more particulars alleged and that appellants caused one or more false statements to be made.

The opinion incorrectly states that there was substantial evidence in the record that the statements made by Taylor were false. This is absolutely incorrect. Taylor gave his name and his address—those were not false. He gave his occupation and much other data in the applications that were not false. In fact, all of the statements that he gave could be said to be true except one disputed statement in which he claimed that he intended to go into the oil transporting business. Whether this was true or false rests on his last statement that it was false; but, in the printed form which he used, were inconsistent statements—some of which could be true or some of which

might not be true. They were not on any War Assets Administration form, and it would appear that this printed form contained the statement that the purchases were not to be for resale. However, the evidence is uncontradicted that the War Assets Administration was selling for the purpose of re-sale; that it had sold to the defendants themselves for the purpose of resale, and the sales were open to dealers on a first come first serve basis, with no priority, at the time of this purchase. Hence, the premises on which this court made its statement is not supported by the evidence.

The court further says that "The instruction correctly states the law," citing cases which ante-date the decisions of the Supreme Court of the United States in the cases of *Haupt v. United States,* 330 U. S. 661, and *Cramer v. United States,* 325 U. S. 1. In each of those cases the Supreme Court of the United States, in effect, held that there had to be unanimity by the jury on the overt act. This instruction deprived the jury of that unanimity. If there is more than one alleged false statement, six jurors might believe one and six others might believe the other, but never agree on the particular statement allegedly false. Hence the instruction is faulty.

We respectfully submit that it was not contended by the Government, in the case, that all of the statements that Taylor made were false. It was conceded in the oral argument that some of the statements allegedly false on certain applications were in fact not false and the court, in giving this instruction to the jury, was apparently mindful of that situation. Therefore, the procedure should have been for the Government to have withdrawn all statements or matters which it was conceded

were indisputably true, or on which there was no substantial evidence, and submitted to the jury only the particular statement allegedly false. The case had to rest, like perjury cases, on all of the statements being false or none of them being false. However, they did not do so and, for that reason, we respectfully submit that the instruction was erroneous and that this court erred in holding that it was correct and this court should grant a rehearing thereon.

The opinion also erroneously held that the trial court was correct in sustaining an objection to the question as to whether Taylor knew that "he would commit a felony at that time." Knowledge by Taylor that he committed a felony was vital to determine whether he was in fact an accomplice so that accomplice instructions might appropriately be not only given but weighed by the jury in the light of their finding that he was in fact an accomplice.

It was not merely for the purpose of bringing out that Taylor had not been prosecuted for the offense and hoped not to be prosecuted that the question was in fact asked. Those questions would not aid the jury in determining whether he had in fact committed a felony along with the appellants, whom he accused, and therefore that his testimony should be given less weight than the testimony of a credible witness. (*People v. Dail,* 22 Cal. 2d 642.)

The admission of Lauridsen's transaction, a man who could not be produced because the evidence showed he was in a psycopathic ward, certainly could not aid in establishing intent on the part of Taylor.

It was therefore error to admit the Lauridsen transaction in support of anything. Intent to make one false statement cannot be aided by the alleged making by somebody else of another alleged false statement.

The request to give an instruction regarding the effect of testimony regarding the conduct of the appellants subsequent to July 11th was not offered for the purpose of having court comment on the evidence but for the purpose of having the jury consider that testimony as to the effect that it would have on the lack of guilty intent on the part of the accused to commit any crime, or to commit any act charged in the indictment.

This court, in its opinion, also unjustly, we feel, and critically discusses the denial of appellants' motion for a bill of particulars. From the reading of the opinion, it would appear that the request for a Bill of Particulars "came at a very late hour," but aside from the matter of whether it was timely, etc., gives a wrong impression of what really happened.

The defendant Todorow was arraigned on April 22, 1947 [R. 9]. On that very day a Motion to Dismiss was made and a Motion for Bill of Particulars was filed and argued on April 24, 1947, two days later [R. 10-11, 72].

The rules provide that a Bill of Particulars may be presented at any time within ten days after arraignment (Rule 7f). Thus, within two days after arraignment of Todorow, and on the same day of the arraignment of Potolski, a request for Bill of Particulars was presented and denied. Surely, the rules would not require, nor was it possible to have presented a request for Bill of Particulars prior to the time of the arraignment of the defendants, and we respectfully submit that the request did not

come "at a very late hour," but in the case of Potolski probably as fast as it could have been presented, as it was presented within a few minutes after arraignment, and in the case of Todorow, within two days after arraignment. We submit that the implied criticism as to its coming at a very late hour would infer that counsel had waited two months after arraignment, when as a matter of fact, he had just come into the case the day before, and asked for bill of particulars the next day.

The request for Bill of Particulars certainly did not contain a request for evidentiary matters of a character to which petitioners were not entitled. The rules of Criminal Procedure themselves provide for the Government to furnish the documentary evidence requested in the Bill of Particulars. Rule 16 of the Rules of Criminal Procedure provide:

> "Rule 16. Discovery and Inspection.
>
> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect anod copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."
>
> New Federal Rules of Criminal Procedure.

This is practically no more than was requested under a Motion for a Bill of Particulars. The request was merely for information contained in the physical documents in the possession of the Government, to which Rule 16 specifically entitle the defendants, and a denial of the information therein requested was a denial of information contained in physical evidence in the possession of the government, which sets forth exact facts necessary for the defense of the case.

We respectfully submit, therefore, that it was error to deny these defendants the Bill of Particulars requested. The Bill also merely asked for the name of a person or persons to whom the forms were given in order that the defendants might make further inquiry and learn facts necessary to complete their defense. For which reasons appellants pray for rehearing and reversal of the judgment.

These appellants are fine young men with enviable war records; they were conducting legitimate business. They sought to aid other veterans rather than to buy from non-veteran dealers who would have made the profit or the money. Had they dealt with such non-veterans, there would have been no case here. Their innocence was demonstrated by the fact that they immediately cancelled any papers involved in their dealings with Taylor.

That they should now face two years in the penitentiary and $3,000 fine each and the loss of all their soldiers' rights* for all time to come upon the testimony of an

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*A veteran convicted of a felony loses all his veteran's rights, under various Veteran Acts.

admitted perjurer suffering from a nervous condition, we submit, is not warranted by the evidence in this case.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellants.

Certificate of Counsel.

I hereby certify that the above petition for rehearing is taken in good faith and not for the purpose of delay and that in my opinion it is meritorious.

MORRIS LAVINE,
Attorney for Appellants.